proceedings casts upon the male, as well as any resulting scandal which might arise, would be obviated in the absence of the law. The question of the efficacy of this legislation is a very close one and cogent reasons to support both sides of the case may be advanced. Its ultimate benefit or detriment is a question which can only be settled in the future by a close comparison of statistics before and after the enforcement of the law.

This is the first case decided on this direct point, but the principles upon which the decision rests are well settled. The State has an inalienable right by virtue of the police power to pass all laws "to secure the general health, comfort and prosperity of the state." COOLEY, CONSTITUTIONAL LIMITATIONS, 830; FREUND, POLICE POWER, § 124. It is in the same class as laws prohibiting marriage with epileptics, (*Gould* v. *Gould,* 78 Conn. 242), laws ordering the destruction of tubercular cattle (*Houston* v. *State,* 98 Wis. 481), laws requiring vaccination (*Blue* v. *Beach,* 155 Ind. 121) and the like, all of which have generally been upheld, having in view the public welfare.

It is interesting in connection with the point raised in the main case to note the statutes passed in several states, providing for the sterilization of criminals and defectives, some of which have been declared unconstitutional. See 12 MICH. LAW REV. 400. Many states have passed laws regulating marriages and declaring marriages void with insane persons, epileptics, idiots, habitual drunkards and the indigent, but there were few states prior to Wisconsin which made any regulation as to venereal diseases and in these states the statute operates as a bar to marriage when the person is afflicted, but no means is provided for the discovery of the disease, and as a result the laws have been of little real value. A note on the state laws regulating marriage will be found in 4 JOURNAL OF CRIM. LAW 422.

M. K. B.

BREACH OF CONTRACT BY REFUSAL TO PERFORM.—The Courts of Appeal in Kentucky and Texas have recently handed down two conflicting opinions regarding what each considers a sufficient refusal to perform by one party to a contract, to allow the adverse party to sue for breach of the contract. In *Elder* v. *Offutt,* 165 S. W. 424 the Kentucky court holds that by continually protesting and objecting, even though actually performing the contract, the defendant had refused sufficiently to give the plaintiff a good cause of action. In *Provident Savings Life Assurance Society* v. *Ellinger,* 164 S. W. 1024 the Texas court on the other hand lays down the hard and fast rule that a contract can be breached only in one of three ways, viz: by failure to perform, by a present positive declaration of an intention not to perform and an acceptance of such declaration by the other party as a repudiation of the contract before performance is again entered upon, and by a positive inability to perform. In *Elder* v. *Offutt* the latter had purchased a pair of scales for the weighing of live stock. He sold a half interest to A, who in time sold it to one Stone. Later Offutt sold his remaining interest to Stone, the consideration being sixty dollars and a perpetual right to use the scales free of charge in whatsoever hands they might be. About a year later Stone sold the scales to Elder who

protested and objected to the use of them by Offutt, but did not actually prevent it, and Offutt continued to use them but brought an action first at law and later, by amendment, in equity to enforce his rights. The court held that there was a sufficient breach to enable the plaintiff to have a court enforce his rights. In the Texas case Ellinger was insured in appellant company under an "annual renewable term policy," which remained in force from year to year if insured paid the premium. While he was so insured the appellant company consolidated with the Postal Life Insurance Company, which sent Ellinger a letter saying it would carry out all contracts of appellant and asked him to sign a policy for the ensuing year. Ellinger refused and sued on the ground that appellant had refused and was unable to perform its contract. The facts showed that appellant had retained some assets and was solvent and able to pay Ellinger. *Held,* that the three ways stated above are the only ones in which a contract may be breached and this did not come under either of them.

It has long been regarded as settled beyond dispute that a party may breach a contract by a declaration of a refusal to perform and that the adverse party may act on this repudiation as a breach and bring suit. ANSON, CONTRACTS, 375; *Hochster* v. *De La Tour,* 2 Ellis & B. 678; *Edward Hines Lumber Co.* v. *Allen,* 73 Fed. 603; *Frost* v. *Knight,* 7 Ex. 111. The declaration need not be in express words, as the party may by his conduct show just as clear an intention not to perform, but his conduct must be clear and unequivocal and constitute an absolute refusal to perform the contract or to recognize it as binding. PAGE, CONTRACTS, § 1439; *Houghton* v. *Callahan* 3 Wash. 158. None of these authorities, however, admits that there is such a breach as to give rise to a cause of action unless the adverse party accepts and acts on such repudiation.

BENJAMIN, SALES (7th Ed.) § 568 says: " A mere assertion that the party will be unable or will refuse to perform his contract is not sufficient; it must be a distinct, unequivocal and absolute refusal to perform the promise, and must be treated and acted upon as such by the party to whom the promise was made; for if he after continue to urge or demand compliance it is plain he does not understand it to be at an end." This doctrine is approved and followed in *Smoot* v. *United States,* 15 Wall. 36; *Dingley* v. *Oler,* 117 U. S. 490; and in *Swiger* v. *Hayman,* 56 W. Va. 123.

In *Sewer Commissioners of Amsterdam* v. *Sullivan,* 42 N. Y. Supp. 358 it was held that where a contractor made a statement saying he would not proceed unless his claim was allowed but did keep on working the city could not discontinue the contract for a breach when the claim was allowed, from which it would seem that the court thought the acceptance and repudiation should go together and certainly that there was no breach while the defendant kept on working.

To the same effect is the decision in *Shields* v. *Carson,* 102 Ill. App. 38, holding that one party might sue on the declaration of the other to stop work only where he accepts such declaration and regards the contract as at an end. From these cases it would seem that the decision in *Elder* v.

Offutt has gone a step farther than the majority of the courts are willing to go, and that they regard the two elements of repudiation and acceptance as going hand in hand and as both absolutely necessary to give a right of action. The decision in *Provident Savings Life Assurance Society* v. *Ellinger* more nearly accords with the accepted rule of law and in *Maguire* v. *J. Neils Lumber Co.*, 97 Minn. 293, the Minnesota court so holds in almost the exact words of the Texas case. They say that the renunciation of a contract required both intention to abandon it and external action so to do, which action was clearly not taken in *Elder* v. *Offutt*. L. C. Mc. C.